

**STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE**

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June 17, 1998

**RECEIVED**  
**JUN 18 1998**

**FCC MAIL ROOM**

Hon. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Re: Docket DA 98-682 - MCI Petition of Declaratory Ruling  
CC Docket No. 96-45

Dear Ms. Salas:

Enclosed are an original and six (6) copies of the Motion to Accept Late-Filed Comments in Opposition, and the Opposition of the New York State Department of Public Service in the above docket. Please date stamp and return one copy of the enclosed self-addressed envelope. We are filing these comments on diskette to Sheryl Todd of the Common Carrier Bureau.

We respectfully request that, pursuant to Sections 1.46 and 1.727, you consider the late filed comments in opposition.

If you have any questions, please do not hesitate to contact me at (518) 474-1585. Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "P. Rubin".

Penny Rubin  
Managing Attorney

Enclosures

cc: MCI Communications  
Misc.98:avy:Salas

No. of Copies rec'd  
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**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON D.C. 20554**

In the Matter of: )  
 )  
Petition for Declaratory Ruling )  
That Carriers May Assess Interstate )  
Customers an Interstate Universal )  
Service Charge Which is Based on )  
Total Revenues )

DA 98-682  
CC Docket No. 96-45

RECEIVED  
JUN 18 1998

**NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE  
MOTION TO ACCEPT LATE-FILED COMMENTS**

The New York State Department of Public Service (NYDPS), pursuant to sections 1.46 and 1.727 of the Commission's rules, 47 CFR sections 1.46, 1.727, hereby moves the Commission to accept NYDPS' comments to MCI's Petition for a Declaratory Ruling in the above captioned matter. The grounds for this motion are as follows:

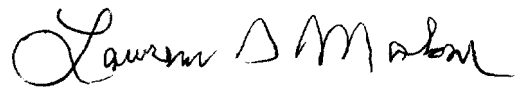
1. On April 24, 1998 the Commission established a pleading cycle for MCI's Petition for Declaratory Ruling.
2. MCI did not serve this Petition on the NYDPS.
3. Until very recently New York had no reasons to believe that MCI would seek to apply a Federal Universal Service Fee surcharge on intrastate calls made by its customers in New York State.
4. As a result of recent communications with MCI, we learned that MCI is imposing this surcharge on New York ratepayers.

5. Therefore, the NYDPS now has a direct stake in the outcome of this proceeding.

6. Acceptance of this late filing will not prejudice MCI.

7. Accordingly, NYDPS moves that the Commission accept its late-filed comments in opposition to MCI's petition for a declaratory ruling.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Lawrence G. Malone".

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New York State Department  
of Public Service  
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Dated: June 17, 1998  
Albany, New York

**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON D.C. 20554**

In the Matter of:	)	DA 98-682
	)	CC Docket No. 96-45
Petition for Declaratory Ruling	)	
That Carriers May Assess Interstate	)	
Customers an Interstate Universal	)	
Service Charge Which is Based on	)	
Total Revenues	)	
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**OPPOSITION OF THE  
NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE**

On April 3, 1998, MCI filed a Petition for Declaratory Ruling requesting that the Federal Communications Commission (the Commission) rule that "carriers are not precluded by the Universal Service Order<sup>1</sup> from imposing a charge on interstate customers that is based on the customers' total billed revenues, including intrastate revenues, to recover federal universal service costs." (Petition, p.1) The Petition should be denied for these reasons.

First, the Commission has already ordered carriers to recover their universal service contributions based only upon interstate usage. Second, MCI is seeking a change to the rules set forth in the Universal Service Order. As such, the petition is untimely and should be denied. Finally, MCI's petition seeks to require the Commission to exercise authority over intrastate

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<sup>1</sup> Federal-State Joint Board on Universal Service, Report and Order, CC Docket 96-45, FCC 97-157, 12 FCC Rcd 8776 (May 8, 1997) (Universal Service Order).

communications, an area specifically reserved to the states under Section 152(b) of the Communications Act of 1934, as amended by the 1996 Telecommunications Act (Section 152(b)).

**MCI'S REQUEST SHOULD BE DENIED BECAUSE  
THE UNIVERSAL SERVICE ORDER CALLS FOR CARRIERS  
TO RECOVER THEIR CONTRIBUTIONS TO THE FEDERAL  
UNIVERSAL SERVICE PROGRAM ONLY  
THROUGH RATES FOR INTERSTATE USAGE**

The Universal Service Order clearly, repeatedly and unambiguously sets forth that carriers are to recover universal service contributions solely through rates for interstate services.<sup>2</sup> In fact, the Commission has claimed authority to require recovery in intrastate rates,<sup>3</sup> but it has repeatedly chosen not to exercise this authority.<sup>4</sup>

MCI claims that its federal Universal Service Fee, which is assessed through federal tariffs as a percentage charge

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<sup>2</sup> See Universal Service Order at par. 809. ("The third dimension to our inquiry is whether carriers may recover their contributions to the universal service support mechanisms through rates for interstate service or through a combination of rates for interstate and rates for intrastate services. ...[W]e conclude... we should maintain our traditional method of providing for recovery, which permits carriers to recover their federal universal service contributions through rates for interstate services only." (emphasis added)); par 831 ("assess contributions for mechanisms based solely on interstate revenues"); pars. 824, 825, 838.

<sup>3</sup> The Commission has noted that issue of its allowing recovery of contributions in intrastate rates is a matter which would have to be reviewed by the Joint Board. See, e.g., *Id.* at 824.

<sup>4</sup> The issue of the Commission's jurisdiction to require carriers to seek recovery of universal service contributions in intrastate rates is currently being litigated in the Fifth Circuit Court of Appeals. Texas Office of Public Utility Counsel, et. al. v. FCC, Case No. 97-60421.

on an interstate customer's intrastate and interstate usage, is in full compliance with the Commission's Universal Service Order as it is the "logical implication of the decision and is consistent with the Commission's rationale for determining the contribution base [interstate and intrastate revenues] for federal universal services."

The Commission seems to have anticipated this argument. The Commission negated this "logical implication", distinguishing assessment of these contributions from recovery of these contributions:

"[W]hen assessing contributions based on intrastate and interstate revenues, the Commission is merely calculating a federal charge based on both interstate and intrastate revenues, which is distinct from regulating the rates and conditions of interstate service."<sup>5</sup>

Further, the Commission specifically addressed carriers' recovery of these contributions:

"[W]e will provide for recovery of the entirety of these contributions via interstate mechanisms."<sup>6</sup>

"[W]e have decided to permit recovery of contributions for the support mechanisms for eligible schools, libraries, and rural health care providers solely via rates for interstate services. Indeed, our rationale is even more compelling for the support mechanisms for eligible schools, libraries, and rural health care providers because those mechanisms will be supported based upon both intrastate and interstate revenues and,

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<sup>5</sup> Id. at par. 821.

<sup>6</sup> Id. at par. 827.

therefore, there is a heightened concern that carriers would recover the portion of their intrastate contributions attributable to intrastate services through increases in rates for residential dial tone service, contrary to the affordability principles contained in section 254(b)(1). Therefore, carrier may recover these contributions solely through rates for interstate services.."(emphasis added)<sup>7</sup>

There is no doubt that the Commission did not intend to permit carriers to recover, as proposed by MCI, universal service contributions from intrastate rates. The rule is clearly set forth in the Universal Service Order - recovery of contributions to the federal Universal Service program is limited to recovery through rates for interstate service. Therefore, MCI's attempt to recover its universal service contribution through rates not only for interstate usage, but for intrastate usage on a customer's interstate bill, is inconsistent with the Commission's order.

**MCI'S REQUEST IS UNTIMELY BECAUSE IT SEEKS  
RECONSIDERATION OF THE UNIVERSAL SERVICE ORDER.**

The proceedings which resulted in the Universal Service Order extended over more than one year's time, and provided opportunities for public comment.<sup>8</sup> Since the release of the

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<sup>7</sup> Universal Service Order at par. 838.

<sup>8</sup> The proceeding culminating in the FCC's Universal Service Order, of May 8, 1997, began on March 8, 1996, when the Commission initiated a rulemaking to reform the system of universal service support pursuant to section 254 of the Telecommunications Act (Federal-State Joint Board on Universal Service, Notice of Proposed Rulemaking and Order Establishing a Joint Board, CC Docket NO. 96-45, FCC 96-93 (Mar. 8 1996)).

Order, the FCC has addressed numerous petitions for reconsideration.<sup>9</sup> Those petitions were filed within thirty days of the Commission's action, as required by statute.<sup>10</sup> Although MCI claims that its petition is for a "Declaratory Ruling"<sup>11</sup>, the May 8, 1997 Universal Service Order left no uncertainty. In effect, MCI seeks a change to the Universal Service Order that would have this Commission order that which the Commission expressly and repeatedly declined to do - provide carriers with authority to recover universal service contributions through intrastate rates.<sup>12</sup> MCI's motion is an untimely petition for

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On November 8, 1996, the Federal-State Joint Board on Universal Services released a Recommended Decision. (Federal-State Joint Board on Universal Services, Recommended Decision, CC Docket NO. 96-45, FCC 96J-3 (Nov. 8, 1996)). On November 18, 1996, the Commission's Common Carrier Bureau issued a public notice seeking comment on the Joint Board's recommendations. (FCC Common Carrier Bureau Public Notice Seeking Comment on Universal Service Recommend Decision, DA 96-1981 (No. 18, 1996)). On May 8, 1997, the Commission released the Universal Service Order addressing the Joint-Board's recommendations.

<sup>9</sup> Most recently, the Commission issued the Fourth Order on Reconsideration, on December 30, 1997.

<sup>10</sup> 47 USC section 405(a), 47 CFR sections 1.101 - 1.106, 1.429.

<sup>11</sup> A declaratory ruling is to terminate a controversy or remove an uncertainty. 47 CFR 1.2.

<sup>12</sup> This action is similar to that brought by the Public Service Commission of Maryland in Public Serv. Comm'n of Maryland, 2 FCC Rcd 1998, 2002-2003 (1987). There the Common Carrier Bureau of the Commission denied Maryland's petition for a "declaratory ruling" on the grounds that, as it was not made within thirty days of the Commission's order, it was an untimely request for reconsideration.



reconsideration or, in the alternative, a request for a rule change, for which this is not the proper forum.<sup>13</sup>

**SECTION 152(B) OF THE COMMUNICATION ACT PROHIBITS  
THE COMMISSION FROM PERMITTING RATE RECOVERY  
BASED UPON INTRASTATE TELECOMMUNICATIONS USAGE.**

MCI, by asking the Commission to allow it to apply a percentage charge to a customer's bill based upon a customer's intrastate and interstate usage, is, in effect, asking to implement an intrastate rate increase through an interstate tariff. There is no basis in law for granting the petition.

It is well settled that Section 152(b) removes intrastate matters from the FCC's reach. The Commission's universal service authority under Section 254 is not exempt from this jurisdictional limitation.<sup>14</sup> In Louisiana PSC v. FCC, 476 US 355 (1986), the Supreme Court clarified that the jurisdictional fence of section 152(b) can only be overcome if Congress included "unambiguous" and "straightforward" language in the Act either modifying section 152(b) or expressly granting the FCC additional authority. Id. at 377. Section 254 provides no

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<sup>13</sup> In CF Communications Corp. v. Century Telephone of Wisconsin, Inc., et. al., 10 FCC Rcd 9775, FCC 95-351 par. 20 (Sept. 6, 1995), the application sought a rule change, not a rule interpretation, and the FCC noted that it was bound to apply its rules. It is well-settled that a complaint proceeding is not the forum in which to change the Commission's rules. Rule changes are such matters that require the development of a factual record on which all interested members of the public, not just parties to the complaint, would have an opportunity to comment.

<sup>14</sup> See, 47 USC section 251(e)(1), 253, 276(b) and 276(c) where Congress clearly provides the Commission with exclusive authority. These provisions are to be considered with Section 254.

such unambiguous authority to permit a federal tariff to include rates for intrastate services.<sup>15</sup>

In effect, MCI is asking the Commission to do, indirectly, that which it cannot do directly - establish jurisdiction with respect to rates "for or in connection with intrastate communications services." 47 USC 152(b). Recovery of contributions to the federal universal service program through a charge based on interstate and intrastate usage would infringe on state authority over intrastate telecommunications, in violation of 152(b). See, Louisiana, 476 US 355 (1986). The Commission lacks authority to increase intrastate rates, whether through a state or federal tariff.


Finally, MCI's petition seeks to raise an unnecessary controversy between the states and the Commission regarding the recovery for costs of the federal Universal Service Program. The Commission has wisely determined that it would work more cooperatively with the states on this issue, and we welcome that opportunity to work cooperatively on this very complex problem.

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<sup>15</sup> As the Commission specifically allowed for recovery only in rates for interstate services, the issue of severability is moot.

**CONCLUSION**

For the reason stated, MCI's petition should be denied.

  
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